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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GELLHEIM, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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September 26, 1962.

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PETITIONER'S REPLY BRIEF

In reply to the Brief for the United States in Opposition petitioner states as follows:

1. The United States has shown no prejudice, asserted no privilege, and established no reason justifying the refusal to produce the report in question. Its sole defense is an alleged lack of materiality and admissibility of the report. But the contention that petitioner made no showing that the accountant's report could be evidence in the criminal case is irrelevant and unresponsive to the issue posed by the petition. Ad-

missibility as evidence is not the criterion for determining whether a defendant is entitled to the production and inspection of a document. If petitioner was entitled to the production of any reports by virtue of the provisions of the Bankruptcy Act, "it is not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316. The use to be made of the reports, once they are produced, is a matter of judgment by defense counsel. Only if such documents are then sought to be introduced does any issue of admissibility arise.

2. The claim that no showing was made as to materiality or relevancy under Rules 16 or 17, Fed. Rules Crim. Proc., is equally unresponsive to the petition. In the first place, since the report was not produced, it is futile to argue over the materiality and relevancy of a document whose very nature remains hidden. The Government's claim of lack of relevancy is therefore meaningless. Moreover, if the petitioner was entitled by virtue of the Bankruptcy Act provisions to the production of the report in question, any problem of satisfying Rules 16 or 17 would disappear. Plainly, if a statute gives an individual an *absolute* right to the production and inspection of a document, that is the end of the matter—and the relevancy of such production is the context of a criminal proceeding is conclusively presumed. See *Campbell* v. *United States*, 365 U.S. 85; *Clancy* v. *United States, supra.**

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* Insofar as it is pertinent to speculate about materiality or relevancy, the Government's assertion that the petitioner's present claim as to possible use of the report is an "afterthought" (Brief, p. 7) is totally unwarranted. The demand for the report both before and during the trial was obviously based on defense counsel's theory that the report might be material or relevant to the preparation of the defense. Why else would the demands have been made?

3. The official court records in the bankruptcy proceedings, of which this Court may take judicial notice, show conclusively that the accountant's report in question was prepared at the official request of the trustee in bankruptcy and that the cost of the report was charged against the estate of the bankrupt. Any contention that this report was not an official report, to which §§ 47(a)(10) and 49 would apply, will not bear analysis.

The official records of the Referee in Bankruptcy of the United States District Court for the Northern District of California, Southern Division, show:

a. That on March 1, 1956, the Trustee petitioned the Referee for authority to employ one Peter Barnett, a Certified Public Accountant, to examine the books and records of the bankrupt "with particular reference to the transactions had between said bankrupt and Kalman Greenhill, LaSalle Industries, Inc., American Robbin Company, and other individuals and corporations affiliated or connected with any or all of the foregoing, and to ascertain the reason for the substantial loss occurring in operations of said bankrupt during the year 1955." It is to be noted that this request, reproduced in full in the Appendix hereto, does not limit the accountant's examination, as claimed in the Dinkenspiel affidavit filed by the Government, to "the period particularly between November 26, 1954, to November 30, 1955." It was a request for a general inquiry into the losses suffered during the whole of 1955. And it was a request premised on "*the belief that benefit will accrue to said bankrupt estate by the employment of said certified public accountant.*" See p. 3a, *infra;* emphasis added.

b. The Referee on March 1, 1956, approved the request and authorized the Trustee to employ Peter Barnett "at the expense of said bankrupt estate" at the rate of $7.00 per hour, "the same in the aggregate not to exceed the sum of $1,000.00."

c. The said Peter Barnett was in fact paid checks, charged to the bankrupt estate, in the amounts of $196.00 (Oct. 19, 1956), $658.00 (April 19, 1956), and $266.00 (June 12, 1956). All of these amounts appear on the official list of disbursements, charged to the bankrupt estate, filed by the Trustee and approved by the Referee.

All of the foregoing documents, certified copies of which are on file with the Clerk of this Court, conclusively demonstrate that the report in question was indeed an official report to the Trustee and that it constituted "information" which was subject to inspection under § 47(a)(10) of the Bankruptcy Act; it was also among those "accounts and papers" which are open to inspection by virtue of § 49 of the Act.*

Any assertion that the report was for the private use and benefit of the Trustee or that it was not filed with the Referee becomes irrelevant. There are no exceptions to the plain commands of §§ 47(a)(10) and 49 in terms of private reports or reports not filed with the Referee. As long as the report deals with the administration of the estate and is paid for out of the estate, the provisions of §§ 47(a)(10) and 49 clearly permit inspection thereof.

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*A request for inspection directed to the bankruptcy Trustee would have been futile since the record here shows that the report in question had been transferred to the possession of the Assistant United States Attorney conducting petitioner's trial.

CONCLUSION

The vital and unresolved issue thus remains whether it was prejudicial error to deny petitioner the production and inspection of the report in question. The dictates of §§ 47(a)(10) and 49 and the principles enunciated in *Ex parte Upperco*, 239 U.S. 435, make appropriate plenary consideration of that issue by this Court.

For the foregoing reasons, underscoring those set forth in the petition, the writ of certiorari should issue to review the judgment of the court below. The statutory provisions are absolute, the error below is plain, and the situation is appropriate for a summary reversal. At the very least, in view of the absolute commands of the Bankruptcy Act, petitioner is entitled to a production of the document and a hearing below as to the question of materiality now raised by the United States. See *Campbell* v. *United States*, *supra*, 99; *Killian* v. *United States*, 368 U.S. 231, 244.

Respectfully submitted,

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Counsel for Petitioner

September 26, 1962.

APPENDIX

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 45957
In Bankruptcy

In the Matter of

WESTCO STEEL COMPANY, *Bankrupt.*

Order Appointing Certified Public Accountant

Upon reading and filing the petition of JOHN COSTELLO, Trustee in Bankruptcy of the above named bankrupt, and good cause appearing therefor:

IT IS HEREBY ORDERED that said Trustee employ PETER BARNETT, a Certified Public Accountant, to examine the books and records of said bankrupt, at the expense of said bankrupt estate.

IT IS FURTHER ORDERED that PETER BARNETT be paid for said services the sum of $7.00 per hour, the same in the aggregate not to exceed the sum of $1,000.00.

DATED; March 1st 1956.

BERNARD J. ABROTT
Referee in Bankruptcy

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 45957
In Bankruptcy.

In the Matter of

WESTCO STEEL COMPANY, *Bankrupt.*

Trustee's Petition for Authority to Employ a Certified Public Accountant

To the Honorable BERNARD J. ABROTT, one of the Referees in Bankruptcy of the above entitled Court, in said District:

I.

That on the 27th day of February, 1956, your petitioner was appointed and qualified as Trustee in Bankruptcy of the estate of the above named bankrupt, and is now acting as such Trustee in Bankruptcy.

II.

That it will be necessary and advisable that a certified public accountant be employed by your petitioner for the purpose of examining into the books and records of said bankrupt, with particular reference to the transactions had between said bankrupt and Kalman Greenhill, LaSalle Industries, Inc., American Bobbin Company, and other individuals and corporations affiliated or connected with any or all of the foregoing, and to ascertain the reason for the substantial loss occurring in operations of said bankrupt during the year 1955, to the end that if any moneys are due to said bankrupt from any or all of the foregoing, your petitioner will have sufficient information to enable him to properly present said claims and if necessary to take legal action thereon; that Peter Barnett, a certified public accountant of San Francisco, California, is well qualified to perform said work on behalf of said petitioner and by reason thereof your petitioner desires to employ said accountant for the purpose aforesaid.

That said certified public accountant is willing to undertake said accounting work at the rate of $7.00 per hour, the total compensation to be paid said accountant not to exceed in any case the sum of $1,000.00, which your petitioner alleges is reasonable compensation for the services to be performed by said accountant.

III.

Your petitioner alleges that prior to adjudication of said bankrupt a bankrupt, a Creditors' Committee was appointed in proceedings instituted by said bankrupt under Chapter XI of the Bankruptcy Act; that said Creditors' Committee had recommended prior to adjudication that upon the books and records of said bankrupt becoming available a certified public accountant be employed for the purpose of conducting an examination and making a report to the Creditors' Committee; that your petitioner likewise joins in the belief that benefit will accrue to said bankrupt estate by the employment of said certified public accountant.

WHEREFORE, your petitioner prays that he be authorized to employ PETER BARNETT, a Certified Public Acountant, for the purposes aforesaid, and that the compensation to be paid to said certified public accountant will be computed at the rate of $7.00 per day, not in any event to exceed in the maximum $1,000.00.

/s/ JOHN COSTELLO
Petitioner

STATE OF CALIFORNIA)
COUNTY OF ALAMEDA) ss:

JOHN COSTELLO, being first duly sworn, deposes and says:

That he is the petitioner named and described in the aforesaid Petition; that he has read said Petition and knows the contents thereof and hereby makes solemn oath that the statements contained therein are true according to his best knowledge, information and belief.

/s/ JOHN COSTELLO

Subscribed and sworn to before me
this 1st day of March 1956.

/s/ M. NOLDEN

Notary Public in and for the County of Alameda, State of California.